

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

BOSTON EDISTON COMPANY,)
CAMBRIDGE ELECTRIC LIGHT COMPANY,)
COMMONWEALTH ELECTRIC COMPANY,)
d/b/a NSTAR ELECTRIC)

D.T.E. 03-121

**COMMENTS OF THE ENERGY CONSORTIUM AND THE
NE DG COALITION IN OPPOSITION TO THE JOINT MOTION
FOR APPROVAL OF SETTLEMENT AGREEMENT**

On June 4, 2004, Boston Edison Company, Cambridge Electric Light Company and Commonwealth Electric Light Company (“Companies” or “NSTAR Electric”) submitted to the Department of Telecommunications and Energy (“Department”) by e-mail a proposed Settlement Agreement, together with a Joint Motion for Approval of the Settlement Agreement.¹ The Settlement Agreement is signed by the Companies, the Division of Energy Resources (“DOER”), Associated Industries of Massachusetts (“AIM”), the Conservation Law Foundation (“CLF”), the Joint Supporters² and the Solar Energy Business Association of New England (“SEBANE”) (collectively the “Settling Parties”).

The Settlement Agreement includes a new set of standby rates (the “Settlement Rates”), which are modified versions of the standby rates originally filed by NSTAR

¹ On June 7, 2004, the Hearing Officer waived the Department’s procedural requirement that a hard copy of the Joint Motion and Settlement Agreement be filed on June 4, 2004.

² The Joint Supporters are composed of Boston Public Schools; Co-Energy America, Inc.; National Association of Energy Service Companies, Inc.; Seamens Building Technologies, District 1; the E Cubed Company, LLC; Predicate, LLC; Energy Concepts Engineering PC; Dgsolutions, LLC; and Pace Law School Energy Project.

Electric on January 16, 2004 (the “Original Standby Rates”), and as modified and amended in NSTAR’s rebuttal case filed on April 21, 2004 (the “Modified Standby Rates”).

For the reasons set forth herein and in our Initial Brief, the members of The Energy Consortium (“TEC”)³ and the NE DG Coalition (“NEDGC”)⁴ hereby oppose approval of the Settlement Agreement.

In opposing the Settlement Agreement, TEC and the NEDGC rely on, and reassert without repeating, the arguments and evidence cited in their Initial Brief. These comments focus primarily on those aspects of the Settlement Agreement warranting additional discussion.

STANDARD OF REVIEW

In assessing the reasonableness of an offer of settlement, the Department must review the entire record of the proceeding to determine whether the settlement is consistent with Department precedent and the public interest, and results in just and reasonable rates. *Cambridge Electric Light Company*, D.P.U./D.T.E. 94-104/95-36, D.P.U./D.T.E. 97-14, D.T.E. 9949 at 6 (2001); *Boston Edison Company*, D.P.U./D.T.E. 92-130-D at 5 (1996); *Boston Gas Company*, D.P.U./D.T.E. 96-50 at 7 (1996); *Bay State Gas Company*, D.P.U./D.T.E. 95-104 at 14-15 (1995). A settlement agreement does not relieve the Department of its statutory obligation to conclude its investigation with a finding that a just and reasonable outcome will result. *Bay State Gas Company*,

³ The Energy Consortium and five-named members, Harvard University, Polaroid Corporation, Massachusetts Institute of Technology, Acushnet Company and Shaws Supermarket (collectively “TEC”).

⁴ American DG, Inc.; Aegis Energy Services, Inc.; Office Power, LLC; Equity Office Properties Trust, Inc.; Northern Power Systems, Inc.; Real Energy, Inc.; Tecogen, Inc.; and Turbo Steam Corporation. American DG, Inc. and Tecogen, Inc. are also submitting additional comments on the proposed Settlement Agreement.

D.P.U./D.T.E. 97-97 at 6 (1997); *Bay State Gas Company*, D.P.U./D.T.E. 95-104 at 15 (1995); *Boston Edison Company*, D.P.U./D.T.E. 88-28/88-48/89-100 at 9 (1989).

Moreover, to accept a settlement which includes cost allocation or rate design, the Department must determine that the proposed settlement is consistent with the Department's goals for utility rate structures. *Bay State Gas Company*, D.P.U./D.T.E. 95-104 at 15 (1995); *Boston Gas Company*, D.P.U. 92-92 (1992); *Massachusetts Electric Company*, D.P.U./D.T.E. 91-52 (1991). It is well established that the Department's goals for utility rate structures are fairness, efficiency, simplicity, continuity and earning stability. See, e.g., *Bay State Gas Company*, D.P.U./D.T.E. 95-104 at 15 (1995); *Boston Edison Company*, D.P.U./D.T.E. 1720 at 112 (1984).

COMMENTS

I. THE SETTLEMENT AGREEMENT SHOULD BE REJECTED AS AN ILL-CONSIDERED ATTEMPT BY A FEW PARTIES TO EXCLUDE THEMSELVES FROM THE RATES AT THE EXPENSE OF OTHER CONSUMERS AND THE PUBLIC INTEREST.

The so-called "settlement" proposed by NSTAR Electric, AIM, CLF, the Joint Supporters and SEBANE does not settle anything. Rather, it represents an ill-conceived effort by a limited number of parties representing a limited set of interests who have colluded with NSTAR Electric to exempt themselves from the proposed standby rates, at the expense of others and the public interest. The proposed Settlement Rates are basically the rates originally proposed by NSTAR with minor modifications. The Settlement Rates include arbitrary and relatively modest "discounts" of general application, and then a series of fairly narrowly crafted exemptions targeted to apply to the Settling Parties, and few others.

A settlement based on a narrow set of exemptions for a limited group of parties is not a reasonable or appropriate basis for rate design or a settlement in this case. The Settlement Rates do not seek to address in a comprehensive manner the structural infirmities of the standby rates as originally proposed or modified. Rather, the proposed Settlement reflects a series of horse trades that are targeted to benefit the Settling Parties. Not surprisingly, the outcome is not reasonable or fair; it is not consistent with the Department's precedent or ratemaking objectives and it is not in the public interest. The Department should reject this settlement of, by and for the few.

One telling fact regarding the fairness or reasonableness of the Settlement Rates is that the parties that will be most directly affected by the Proposed Settlement Rates are not parties to the Settlement and actively oppose its terms. If all, or nearly all of the Intervenors that would be subject to, and significantly and directly affected by the proposed Settlement Rates were to reach an agreement regarding a standby rate design, the Department might have some confidence in the knowledge and expertise of such parties and grant some deference to the collective judgment of the group. After all, parties to this proceeding have generally agreed with the goals stated by the Department for design of standby rates. *See NSTAR Electric*, D.T.E. 03-121 February 17, 2004 (*Comments of the New England DG Coalition*); *Direct Testimony of Henry C. LaMontagne*, *Exhibit NSTAR HCL-1 at 8-11*. However, the proposed Settlement provides no such circumstance.

Customers seeking to install medium to large sized natural gas fired co-generation facilities will be most substantially and specifically affected by the proposed Settlement Rates. Not one of these customers or DG Developers supports the proposed Settlement

Agreement. All that were involved in the case actively oppose this settlement including: Acushnet Company, Harvard University, MIT, Shaws Supermarkets, Turbosteam Corporation, Equity Office Properties, OfficePower, RealEnergy and others. In addition, several distributed generation companies that manufacture or install smaller sized distributed generation facilities like Aegis Energy and Tecogen also oppose the Settlement Agreement.⁵

The members of TEC and the NEDGC believe that policy outcomes should be established by the facts, law and merits, rather than a series of horse trades by a limited group of participants with narrow, unspecific, ambivalent or even conflicting interests. The result of such limited compromises are Settlement Rates disconnected from the principles set forth by the Department when it opened this investigation, and un-tethered to the facts and evidence in the record, or existing Department precedent.

The most important goal for standby rates is that they properly reflect the marginal and embedded costs of providing such service. The proposed Settlement Rates are just as disconnected from the actual costs of standby service as the Originally Proposed Standby Rates or the Modified Proposed Standby Rates. Accordingly, approval of the Proposed Settlement Rate will result in the improper deterrence of distributed generation in Massachusetts in direct contradiction of the stated policies of the Commonwealth of Massachusetts.

We recognize that proposed Settlement Rates include certain modifications to the NSTAR Standby rates which do represent a modest improvement over the latest version of NSTAR's Modified Proposed Standby Rates. For example, the proposed Standby

⁵ We note that TEC, American DG, Tecogen and Office Power have all filed separate comments stating the terms upon which it would support the Settlement Rates.

Rates include discounts up to 20%, and the effective date of the rates is extended three months. However, in light of the serious flaws in NSTAR's Original and Modified rate designs, these improvements can be thought of in the same way that if you walk east for five minutes, you will be closer to London. Simply put, the Proposed Settlement Rates are a long way from being fair and reasonable, consistent with Department Precedent or in the public interest.

Rather, the Settling Parties have all bargained for exemptions from the onerous terms of the NSTAR standby rates, while agreeing that others should be subject to those same rates. The narrow crafting of the exemptions is illustrated by a brief review of the modifications proposed. For example, the amended Availability provision of Rate SB-1 (M.D.T.E. 136A (Settlement)) provides that any Customer "that is a facility that includes a municipal public school" shall not be subject to the tariff if: (a) such customer began operating the DG by January 1, 2006; (b) it had binding financial commitment to install the Generation Units by Dec. 31, 2004; and (c) Its Generation Units are less than 1,000 kW in aggregate. (*see* M.D.T.E. No. 138 (Settlement)).

It is no coincidence that the only active members of the Joint Supporters in this case are the Boston Public Schools and Co-Energy America, Inc. a developer installing DG systems in the Boston Public Schools. The provision was specifically tailored to meet the needs of this Settling Party, and other municipal public schools (none of which are in the case). Needless to say, there are countless other customers with similar load characteristics that would not enjoy the exemption and special treatment afforded "municipal public schools." Such blatant discrimination is not appropriate and inconsistent with Department ratemaking principles.

Similarly, Paragraph 4 of the Availability clause was modified to exempt “renewable energy technologies” as that term is defined in G.L. c. 40J, § 4E(f)(1) on May 28, 2004. This provision exempts all the members of SEBANE, and also exempts other renewable technologies like wind. While this group may appear to include many potential installations, a review of the record suggests that on an aggregate basis, solar power systems are not likely to have a significant impact on the distribution system. Paragraph 5 of the Availability clause allows a limited amount of fuel cells to be exempt from the rates. While we cannot read the minds of the other parties, we suggest these exemptions for renewable energy technologies apparently satisfied the needs and interests of the DOER and Conservation Law Foundation. As a side note, DOER has decided to seek a settlement which leaves energy efficient co-generation (also referred to as combined heat and power or CHP) systems for the most part subject to these onerous standby rates, in contradiction of the stated policies of the Romney Administration. We are struck by the irony that all of DOER’s funding is to be taken from ratepayer contributions directed toward supporting energy efficiency and demand side management programs.⁶

As to the Associated Industries of Massachusetts, we note that from the beginning of this case, AIM has exhibited a certain ambivalence. This ambivalence is not surprising as we understand that AIM has members on both sides of the issues in this case, and we also understand that the Companies are contributing members of AIM. This ambivalence was reflected in the single page Comments offered at the outset where AIM contrasts the potential barriers presented by DG with the potential concerns regarding cross-

⁶ See, *NSTAR Electric D.T.E. 03-121* (Letter from AIM to DTE dated (Feb. 13, 2004)

subsidization.⁷ AIM's ambivalence is also reflected in the fact that while AIM was granted full intervenor status, AIM has not actively participated in this case. AIM did not seek any discovery. AIM did not present a direct case. AIM did not cross-examine any witnesses. In summary, despite the fact that AIM has an impressive roster of members, the fact that AIM joined the Settlement should not be accorded much weight by the Department due to the expressed ambivalence about the outcome, the lack of active participation in the case, and the potential conflicting interests which are present.

II. THE SETTLEMENT CONTRAVENES THE POLICIES OF THE COMMONWEALTH OF MASSACHUSETTS.

Massachusetts has taken a consistent position in favor of distributed generation and efficient co-generation (also known as Combined Heat and Power or CHP). The pro-DG policy was articulated by the Department in this case and in D.T.E. 02-38; by the Legislature in the Restructuring Act (*See Massachusetts G.L. c. 164 § 1G(g)* for provision exempting qualifying facilities from exit fees); and most recently by the Current Administration in the Massachusetts Climate Protection Plan (*Exhibit DOER 1-19 (supp)* at 25 and 31), the Governor's Task Force on Reliability (*Exhibit NSTAR-DOER 1-21* at iii-iv), and even the Initial Comments of the DOER filed at the outset of this case. This policy in favor of clean, efficient Distributed Generation is firmly rooted in a recognition that DG can provide benefits to Massachusetts including lower energy prices, higher reliability, easing of T&D congestion, less polluting emissions and other benefits.

⁷ See *NSTAR Electric* D.T.E. 03-121 (Comments of AIM (Feb. 13, 2004) "[E]mbedded in this proceeding is the serious risk that customers who have not chosen to install distributed generation, and will not benefit from its installation, will be picking up the costs of those that do ? [sic] creating significant cross-subsidation."

In addition, new DG projects can provide significant economic development for the Commonwealth. For example, a single 1.5 MW DG installation can bring several million dollars of economic activity to Massachusetts. As DG proliferates, the aggregate impact on economic development in the Commonwealth will be significant.

It is now time for the Department to take firm and decisive action in support of distributed generation in the Commonwealth of Massachusetts. In contrast, approval of the Settlement by the DTE will send a very clear but unfortunate message to those parties seeking to bring the benefits of distributed generation to Massachusetts that DG is not welcome in Massachusetts.

The Department should reject the Settlement Proposal as an inappropriate, ill-considered and improper effort to allow certain specific customers to avoid the impacts of onerous standby rates, while others will be left to pay the price.

III. THE PROPOSED SETTLEMENT FAILS TO SATISFY THE STATED OBJECTIVES OF THE DEPARTMENT IN THE INSTANT PROCEEDING.

In the Notice of Public Hearing issued at the outset of this case, the Department stated that it would “investigate the proposed tariffs in order to ensure that the Companies used an appropriate method for the calculation of standby or back-up rates for customers who have their own on-site, self-generation facilities” *NSTAR Electric*, D.T.E. 03-121 (Jan. 20, 2004) (Notice of Public Hearing). The Department went on to state that in particular, it would investigate whether (1) the proposed standby rates ensure that customers with their own on-site, self-generation facilities pay an appropriate share of the distribution system costs; (2) distribution companies should recover their costs through

fixed or variable charges; (3) standby rates should reflect embedded and/or incremental costs; and (4) distribution companies should offer firm and non-firm standby service. *NSTAR Electric*, D.T.E. 03-121 (Jan. 20, 2004) (Notice of Public Hearing. Thus, the Department broadened the scope of the proceeding intentionally to include matters relating to distributed generation beyond the terms of the NSTAR tariff. *NSTAR Electric*, D.T.E. 03-121 (February 13, 2004) (Hearing Officer's Ruling on Petitions for Leave to Intervene).

The Department, the Companies and the intervenors approached this case with dedication and commitment to investigate, understand and resolve many important issues and questions regarding the development of fair and reasonable standby rates. The record in the case is impressive and the result of many hundreds of hours of intensive effort. The case record includes eight days of hearing testimony comprising roughly sixteen hundred pages, a dozen motions, more than six hundred fifty exhibits, and hundreds of thousands of dollars in legal fees, Department staff time and corporate time and effort.

The Settlement Agreement ignores all of the evidence presented in the case to arrive at a compromise that is neither fair to those that remain subject to the Settlement Rates nor reflective of the substantial body of evidence in the case record. If the outcome of the case is to be decided by a series of last minute horse trades, then why did the Department put itself and the DG industry through the significant effort and expense to conduct a full proceeding?

Having set a course to resolve the standby issue in a comprehensive fashion, the Department has the responsibility to follow through and finish the job. We are confident that a thorough review of the evidence in this case will lead the Department to the

inexorable conclusion that the rates proposed by NSTAR, whether as originally proposed, as modified or finally as settled, are not fair, not reasonable, not consistent with the Department's ratemaking objectives nor in the public interest.

Drawing on the record of the case, the Department should establish guidelines for the development of standby rates that account for both costs and benefits of distributed generation to be measured accurately. The rates should be designed to comply with PURPA requirements of non-discrimination. The Department should require a cost of service study for standby service Customers to develop an appropriate and accurate revenue requirement and accurate measure of marginal costs. The Department should base any rate design guidelines on actual data and not unfounded speculation.

The labor and capital resources dedicated to this case, must surely surpass a million dollars. Much of this money was funded by the ratepayers. This case was conducted by the parties with the expectation that the Department would resolve the pressing issues and provide some sense of certainty to the market and a firm decision for moving forward. Anything less than a full adjudication of this proceeding would be an abdication of responsibility and a disservice to the ratepayers Massachusetts.

The NE DG Coalition was formed to coordinate the efforts of disparate DG owners, operators and installers involved in this case. While DG companies come in all sizes, with different needs, the one thing that all DG companies can agree on is that the Department should resolve the issues regarding standby rates in a manner that conveys clarity and understanding and provides a solid basis for principled design of standby rates in the future. Based on the issues identified by the Department at the outset, and given the Department's clearly stated intention to resolve a broader set of issues regarding

standby rates than the specific rates proposed in this case, it would not be just or reasonable or in the public interest to approve the Settlement.

IV. THE SETTLEMENT AGREEMENT IS INCONSISTENT WITH DEPARTMENT PRECEDENT AND APPLICABLE LAW AND VIOLATES THE DEPARTMENT'S RATE STRUCTURE GOALS.

Based on the record in this proceeding, the Department must reject the proposed Settlement Agreement because it will not result in just and reasonable rates. The arguments in support of our Comments are set forth in greater length and detail in the Initial Brief of the TEC and the NEDGC filed with the Department on June 4, 2004 ("Initial Brief"), which we incorporate herein by reference. In these Comments, we will offer summary points only and refer to the Initial Brief for more comprehensive treatment of the issues discussed herein. First, the Settlement Rates should be rejected because they are unduly discriminatory. It is unduly discriminatory to treat customers with similar loads differently. *Boston Edison Company*, D.P.U./D.T.E. 85-286-A/85-271-A, p.275 (1986). Based on the testimony of Ms. Saunders and Mr. LaMontagne, it is clear that DG customers have load characteristics similar to those of all requirements customers. Because the load characteristics are the same, the Department must reject the proposed Settlement Agreement, which would subject DG customers to different and more onerous rates than customers without onsite generation. *See Initial Brief at 13-19*. At a minimum, the Department should rule that any standby rates are optional, until there is sufficient load and cost data showing that discriminatory treatment is warranted.

Second, the Department must reject the Settlement Agreement because the proposed settlement rates violate the Department's rate structure goals. The proposed

rates are inappropriately based on the otherwise applicable rates and do not reflect the costs of providing service to DG customers. *Initial Brief at 20-32*. The testimony of Mr. LaMontagne and Ms. Saunders shows that the otherwise applicable rates are roughly twice the marginal cost of providing service, and roughly twice the embedded cost revenue requirement. *Initial Brief at 24-26*. The proposed rates also contain a prohibited demand ratchet. *Initial Brief at 32-34*. There is nothing in the Settlement Agreement which conforms to proposed rates to the Department's rate structure goals. In fact, the settling parties have not offered a single reason why the Department should even accept the Settlement Agreement.

Third, the proposed rates are anti-competitive and will discourage new distributed generation in NSTAR Electric's service territory. *Initial Brief at 34-42*. By inhibiting the deployment of cost effective distributed generation in Massachusetts, the Settlement Agreement is anticompetitive and inconsistent with public policy.

CONCLUSION

On the record of this case, the proposed Settlement Agreement is inconsistent with the Department's rate structure goals and the public interest. The Settlement Rates, just like the rates originally proposed in this case, are inconsistent with Department precedent, the Department's rate structure goals, public policy and the public interest. The Settlement Rates are not based on the costs incurred to provide the standby service. Those costs are not known. Moreover, the Settlement Rates fail to account for the potential benefits of distributed generation. Given the un-controverted evidence in the case that the rates will have an anti-competitive impact and deter distributed generation in Massachusetts, NSTAR Electric should not be granted the benefit of the doubt. The Settlement Agreement will not ensure just and reasonable rates. It must be rejected.

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